

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF BOSTON

and

BOSTON POLICE PATROLMEN'S
ASSOCIATION

*
*
*
*
*
*
*
*
*

Case No. MUP-12-1449

Date issued: April 15, 2014

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Anne Marie Noonan, Esq. - Representing the City of Boston

Amy Laura Davidson, Esq. - Representing the Boston Police Patrolmen's
Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Boston (City or Employer) violated
2 Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by failing
3 to bargain in good faith when it required unit members to purchase replacement vests
4 without first giving the Boston Police Patrolmen's Association (Association) prior notice
5 and an opportunity to bargain to resolution or impasse over the decision and the
6 impacts of that decision on employees' terms and conditions of employment. For the
7 reasons explained below, I find that the City violated Section 10(a)(5) and, derivatively,

1 Section 10(a)(1) the Law by failing to bargain in good faith when it required unit
2 members to purchase replacement vests without first giving the Association prior notice
3 and an opportunity to bargain to resolution or impasse over the decision and the impact
4 of that decision on employees' terms and conditions of employment.

5 STATEMENT OF THE CASE

6 On January 3, 2012, the Association filed a Charge of Prohibited Practice
7 (Charge) with the Department of Labor Relations (DLR), alleging that the City had
8 engaged in prohibited practices within the meaning of Section 10(a)(5) and derivatively,
9 10(a)(1) of the Law. On April 12, 2012, a duly-designated DLR Investigator issued a
10 Complaint of Prohibited Practice (Complaint) alleging that the City unlawfully required
11 officers to purchase replacement traffic vests without first providing the Association with
12 notice and an opportunity to bargaining to resolution or impasse over that decision or
13 the impacts of the decision. On April 26, 2012, the City filed its Answer.

14 On May 30, 2013, I conducted a hearing at which both parties had a full
15 opportunity to be heard, to examine and cross-examine witnesses and to introduce
16 evidence. The City and the Association filed their post-hearing briefs on June 27 and
17 July 1, 2013, respectively.

18 STIPULATION OF FACTS

19 The parties stipulated to the following facts:

- 20 1. The City is a public employer within the meaning of Section 1 of the Law.
21
22 2. The Association is an employee organization within the meaning of Section 1 of
23 the Law.
24
25 3. The Association is the exclusive bargaining representative for patrol officers
26 employed by the City in its Police Department (Department).
27

1 4. Prior to October of 2008, the Department required certain police officers to wear
2 traffic belts while directing traffic and performing other specific duties. When the
3 belts became worn, the Department replaced the traffic belts at no cost to the
4 police officers.

5
6 5. In October 2008, the Department began requiring officers to wear traffic vests
7 when directing traffic, rather than traffic belts. The Department is requiring
8 officers to purchase replacement vests when the vests become worn.

9
10 FINDINGS OF FACT

11
12 **Background**

13 **Collective Bargaining Agreements**

14 The Association and the City were parties to collective bargaining agreements
15 effective from July 1, 2002 – June 30, 2006 (2002-2006 Agreement) and July 1, 2006 –
16 June 30, 2007 (2006-2007 Agreement). On July 9, 2007, the parties signed a
17 Memorandum of Agreement (MOA) extending the terms of the 2006-2007 Agreement
18 and increasing the Article XVII Uniform and Clothing Allowance to \$800, effective
19 January 2008. The Association and the City were also parties to a successor collective
20 bargaining agreement effective from July 1, 2007 – June 30, 2010 (2007-2010
21 Agreement). On November 2, 2010, the parties signed another MOA, extending the
22 terms of the 2007-2010 Agreement through June 30, 2011.

23 Article XVII, Section 5 of the 2007-2010 Agreement pertained to compensation
24 for uniform and clothing that stated, in pertinent part:

25 Effective January 2008: increase to \$800

26
27 Effective upon ratification of the Agreement, the City of Boston and the
28 Boston Police Department shall incur the complete initial cost of all new
29 equipment and clothing required by the Boston Police Department. In the
30 event that the Department requires new pants, shirts (long sleeve and
31 short sleeve), each officer shall be provided with three sets of each.
32

1 1. An employee shall retain a record of his expenditures and complete
2 clothing inventory form supplied by the City.

3
4 2. Employees hired at any time during the calendar year shall be
5 advanced the allowance payable for such calendar year at time of
6 appointment.

7
8 3. Uniforms so purchased must conform to Department specifications.
9

10 **Student Officers**

11 Pursuant to G.L., chapter 41, section 96B,¹ Student Officers who are enrolled at
12 the Boston Police Academy (Academy) are not eligible to become members of the
13 bargaining unit and are exempted from "any collective bargaining agreement" for the
14 period of their enrollment in the Academy.

15 Although Student Officers are not members of the bargaining unit, the
16 Association may represent them for matters concerning compensation and wages.
17 Association Representative William Shaw (Shaw) is responsible for representing unit
18 members who are assigned by the Department to work at the Academy. Shaw does not
19 negotiate on behalf of student officers and does not have the authority to represent

¹G.L. c. 41, § 96B states, in pertinent part:

Every person who receives an appointment to a position on a full-time basis in which he will exercise police powers in the police department of any city or town, shall, prior to exercising police powers, be assigned to and satisfactorily complete a prescribed course of study approved by the municipal police training committee. The provisions of chapter thirty-one and any collective bargaining agreement notwithstanding, any person so attending such a school shall be deemed to be a student officer and shall be exempted from the provisions of chapter thirty-one and any collective bargaining agreement for that period during which he is assigned to a municipal police training school, provided that such person shall be paid the regular wages provided for the position to which he was appointed and such reasonable expenses as may be determined by the appointing authority and be subject to the provisions of chapter one hundred and fifty-two.

1 them per G.L., c. 41, § 96B. Instead, Shaw only responds to issues pertaining to patrol
2 officers in the bargaining unit whom the Department has assigned to evidence
3 management, central supply and the police range.

4 After graduating from the Academy, the Department promotes Student Officers to
5 "Probationary Officers" who remain ineligible for unit membership and do not receive full
6 rights and benefits of the contract until they satisfy a one-year probationary period.
7 After completing the probationary period, the Department promotes Probationary
8 Officers to permanent Patrol Officers who then become members of the bargaining unit.
9 Beginning with Academy Class 48-08 (which graduated in June of 2009) and ending
10 with Academy Class 51-12, four classes of approximately 150 total Student Officers
11 have graduated from the Academy.

12 The Department requires each class of Student Officers to purchase their own
13 uniforms and equipment. Prior to October of 2008, the Department provided Student
14 Officers with their initial traffic belts and replaced them at no cost to the Student
15 Officers. Since October of 2008, when the Department eliminated the traffic belts in
16 favor of traffic vests, it has required all Student Officers to purchase both their initial and
17 replacement traffic vests prior to performing traffic training at the Academy. The
18 Department employed Lieutenant Michael Chapman (Chapman) as Academy Registrar
19 in 2002 and, in 2006, promoted him to Academy Executive Officer. As Executive
20 Officer, Chapman along with the Registrar and Platoon Officer John Ezekiel (Ezekiel),
21 inspects all mandatory uniform and equipment purchases, including traffic vests, prior to
22 a Student Officer's graduation to ensure compliance with the Department's rules.

23 **Uniforms and Equipment**

1 The Department requires officers to wear uniforms and use certain equipment.
2 Equipment differs from uniforms because the latter consists of clothing items (shirts,
3 pants, jackets) that officers wear daily, whereas equipment consists of other items (e.g.,
4 service weapons, belts, handcuffs, pouches, holsters, riot helmets, batons and
5 accessories). Generally, the Department pays the cost for initial equipment items. In
6 some cases, it has also paid for both the initial and replacement costs of certain
7 equipment items, such as nylon coats; raincoats; bicycle squad jackets; tactical
8 uniforms, boots and sneakers; gloves; buttons; helmets; motorcycle unit eyewear/safety
9 goggles; ribbons; batons; holsters; tie clips; badges; etc. The Department replaces all
10 uniform and equipment items, at no cost to the officers, when those items are damaged
11 in the line of duty.

12 Prior to 2008, the Department categorized traffic belts as equipment. Each belt
13 had cross straps in the front and back that wrapped around an officer's waist. The
14 Department required officers to use traffic belts as part of their safety equipment. Since
15 at least 1989, the Department required officers to use orange traffic belts. In the early
16 1990s, the Department stopped using orange traffic belts and required officers to use
17 white reflective traffic belts. Regardless of color, prior to 2008, the Department provided
18 all officers, including student officers, with their initial traffic belts and paid the
19 replacement costs when those belts became worn.

20 When the Department stopped using traffic belts in 2008 and began using traffic
21 vests, it continued to categorize the vests as equipment. Like traffic belts, the
22 Department required officers to use traffic vests for directing traffic and controlling
23 crowds, especially during inclement weather and special events, such as: the Boston

Marathon, Caribbean Festival, First Night and other parade assignments. Traffic vests generally last for 25 washes and have an average lifespan of three to four years before needing to be replaced. Since 2008, the costs of the traffic vests have increased from around \$40 in 2008 to \$52 in 2013.

Rule 102

On or about February 11, 2003, the Department issued amended Rule 102 The Conduct and General Rights and Responsibilities of Department Personnel, which states, in pertinent part:

Sec. 5 MAINTAINING DEPARTMENT RULES AND PROCEDURES: Employees of the Department shall sign a receipt for a copy of this and all other subsequent Rules and Procedures of the Department as they are promulgated. Employees shall maintain their copies of the Rules and Procedures of the Department in the binder provided and shall be prepared to produce their binder for the examination or inspection by the members of the Staff Inspection Division or any superior officer or supervisor upon reasonable notification. In addition, employees shall be responsible for knowledge of, and full compliance with, all Rules and Procedures of the Department that apply to their duties.

District and unit commanders shall return the signed acknowledgements of the receipt of Department Rules and Procedures to the Staff Inspection Division after all personnel under their command have signed the receipt list.

Special Order 06-006 and Rule 306

Special Orders are issued via e-mail by the Department Commissioner who sends notice to Department employees, including Union executive officers. On or about February 28, 2006, Department Commissioner Kathleen M. O'Toole (O'Toole) issued Special Order 06-006, Rule 306 Uniforms and Equipment (Rule 306), which made the Department responsible for issuing "white reflectorized" traffic belts to personnel assigned to traffic, motorcycle or mounted duty. Although Rule 306 was silent about

whether the Department would also replace the white reflectorized traffic belts, the Department's 19-year established practice was to issue and replace the belts on request of the officers. Special Order 06-006 stated, in full:

Effective immediately, the attached Rule, Rule 306, Uniforms and Equipment is hereby issued, superseding all previously issued rules, orders and other directives on this subject.

Commanding Officers shall ensure that this order and the attached Rule are posted on Department bulletin boards until Rule 306 has been issued to each member of the Department.

Rule 306 was 16 pages and stated, in pertinent part:

This rule is issued to establish regulations for the wearing and maintenance of the Boston Police Department uniform. It is effective immediately, replacing Rule 306, Uniforms and Equipment, Amended, dated October 28, 1985 and superseding all other written directives issued by the Department concerning uniforms and equipment.

Sec. 5 All Officers Are Required to Have the Uniforms and Equipment Suitable to Their Assigned Units. Uniforms Purchased Must Conform to Department Specifications.

A) Cap Accessories...

B) Caps...

C) Jackets...

D) Optional Uniforms...

E) Shirts...

F) Trousers...

G) Necktie...

H) Socks...

I) Shoes...

J) Boots...

K) Gloves...

L) Whistle...

M) Traffic Belts:

White Reflectorized. For use by personnel assigned to traffic, motorcycle or mounted duty.

N) Rain Gear...

O) Earmuffs...

P) Jumpsuits...

Q) Helmets...

R) Trouser Belt...

1 S) Leather/Nylon Equipment...
2 T) Service Weapon...
3 U) Safety Goggles...
4 V) Baton...
5 W) Riot Baton...
6 X) Oleoresin Capsicum Spray...
7 Y) Handcuffs...
8 Z) Emblems, Patches, Tie Clips, and Badges...
9

10 SPECIAL NOTE

11
12 Following is the list of all equipment/accessories issued by the
13 department:
14

15 BATON
16 RIOT BATON
17 BATON KEEPERS
18 BODY ARMOR
19 BOOTS (Motorcycle and mounted patrol officers only.)
20 CAP ACCESSORIES (Metal Expansion Band and Cap Badge
21 Silver for Police Officers
22 Gold for Superior Officers
23 EMBLEMS, PATCHES, TIE CLIPS, CHEVRONS, BADGES
24 GLOVES: (Motorcycle and mounted patrol officers only.)
25 Orange Reflective Mittens – for use by personnel assigned to traffic duty
26 only.
27 HANDCUFFS
28 HELMETS
29 JUMPSUITS
30 LEATHER EQUIPMENT: Standard department-issued holster for 2-inch or
31 4-inch weapon.
32 MACE
33 TRAFFIC BELTS (White Reflectorized)
34 SAFETY GOGGLES (Motorcycle operators)
35 SERVICE WEAPON (As authorized by the Commissioner.)
36 WALKIE-TALKIE RADIO AND HOLDERS, CHARGERS AND SPARE
37 BATTERY
38

39 The 2008 Bargaining Sessions

40 Sometime in 2008, Association President Tommy Nee (Nee) contacted Chief of
41 Police Daniel Linskey (Linskey), inquiring about new federal regulations for public safety
42 equipment that mandated the color Anci 3 (neon/fluorescent green). During his inquiry,

1 Nee also informed Chief Linskey that Association Secretary Patrick Rose (Rose) was
2 performing a detail assignment in South Boston while wearing an Anci 3 prototype traffic
3 vest with removable panels. Chief Linskey visited Rose at the detail work site where
4 Rose demonstrated the safety features of the traffic vest, including its removable
5 panels. Rose also contrasted the belt against the vest and explained how the former
6 had non-removable cross straps that could potentially endanger an officer who was
7 physically ensnared by another person, vehicle or other object. After Rose's
8 demonstration, Chief Linskey agreed to meet with the Association to bargain over the
9 issues of the new ANCI-3 and the possibility of switching to traffic vests.

10 The Department and the Association met several times to bargain² over: (1)
11 establishing a clearer standard for equipment and uniforms, including whether to
12 replace traffic belts with traffic vests, and (2) the new ANCI-3 color change and how it
13 would affect traditional uniforms and equipment in terms of cost, design, etc. Present at
14 those bargaining sessions from the Department were: Commissioner Edward F. Davis
15 (Davis), Director of Labor Relations Kevin Foley (Foley) and Chief Linskey. Present for
16 the Association were: President Nee, Vice President Ron McGillivray (McGillivray) and
17 Secretary Rose.³

18 During one meeting, Rose presented Chief Linskey with three pieces of
19 equipment (coats (rain/nylon/leather), traffic vests and traffic belts) and proposed using
20 traffic vests instead of traffic belts. The parties also discussed other pieces of

² Neither party provided exact dates for any of the bargaining sessions.

³ The record is not clear about whether all identified persons on both the Department's and Association's bargaining teams attended all bargaining sessions at the same time.

1 equipment and uniforms, including: rain pants and raincoat patches; motorcycle gear
2 and balaclava winter hats; mesh hats and blauer storm coats.

3 At some point during the parties' negotiation sessions, the parties agreed that the
4 traffic vest would replace the traffic belt. During those sessions, the parties never
5 discussed whether the Department or individual officers would be responsible for the
6 costs of replacement vests. However, the parties did discuss: the potential costs of
7 switching from traffic belts to traffic vests; the dimensions of the vests; how to
8 incorporate the new traffic vests into Rule 306; and whether the Department could
9 secure general funding for all discussed uniforms and equipment items, including the
10 vests.

11 During the parties' last bargaining session, Rose and Nee met with Chief Linskey
12 and Commissioner Davis in the Commissioner's Conference Room (Commissioner's
13 meeting) and continued to bargain over certain uniforms and equipment, including the
14 new traffic vests. Once the parties agreed on certain terms for those items, Chief
15 Linskey turned to Commissioner Davis and proposed a "one and done" solution, where
16 the Department would only purchase the initial traffic vests while the officers would be
17 responsible for purchasing all replacement vests. The Union was not aware of Chief
18 Linskey's conversation with the Commissioner about a possible one-and-done
19 bargaining arrangement. After speaking with Chief Linskey, Commissioner Davis left
20 the room and contacted the Mayor's office by telephone, seeking final approval and
21 funding. On his return, the Commissioner announced that the Mayor's Office had

1 approved his funding request for all of the discussed items. At that point the parties
2 agreed that the Employer would pay for the initial vests.⁴

3 After the Commissioner's meeting, the parties did not bargain further over the
4 issue of traffic vests.

5 **Special Order 08-035 and Revised Rule 306**

6 By e-mail on or about October 22, 2008, Commissioner Davis issued Special
7 Order 08-035, which revised Rule 306 (Revised Rule 306), eliminating traffic belts and
8 replacing them with traffic vests. Although Rule 306 specifically listed traffic belts as an
9 equipment item "issued by the Department," Revised Rule 306 does not include traffic
10 vests on the list of equipment "issued by the Department."⁵ Also, Revised Rule 306

⁴ On re-direct examination, Rose testified that he "did not believe" that the parties specifically discussed who would be responsible for the replacement costs of the traffic vests. On re-cross examination, he testified that the parties generally discussed how much the vests would cost but never specifically discussed who would pay for the initial and/or replacement costs of the vests. On direct examination, Chief Linskey testified that he spoke directly to Commissioner Davis about a possible "one-and-done" arrangement for the traffic vests at the parties' final bargaining session. However, Chief Linskey also admitted on cross-examination that the Department never discussed the "one-and-done" proposal with the Association in specific regard to the traffic vests; instead, he testified that the proposal pertained to a general discussion between the parties about all uniform and equipment items that would be impacted by the new federal regulations. Further, when Commissioner Davis informed the parties that the Mayor's Office had approved his request for funding, Chief Linskey conceded that neither party addressed whether that funding would specifically cover the costs of replacing the traffic vests. Based on the totality of evidence presented, I credit Rose's testimony and find that the parties' never bargained over the issue of who would be responsible for the costs of replacing the traffic vests.

⁵ On cross-examination Rose admitted that he first noticed the change only after Association counsel had pointed to its omission in Revised Rule 306. However, the record does not show in what year Association counsel notified Rose about that change and the Respondent did not proffer rebuttal evidence to that issue. Thus, based on Rose's testimony that he first became aware of the change when Central Supply denied a unit member's request for a replacement vest, I find that Association Counsel also informed Rose about the disputed change in or about October of 2011.

omits from the issued-items list certain equipment that the Department continues to issue and replace at no cost to the officers (e.g. ammo carriers, double ammo carriers and cuff carriers; rain boots; bicycle socks and bicycle sneakers; tactical body armor, tactical boots and tactical jackets; accessories (emblems, tie clips, badges)).

Special Order 08-035 states, in full, that “Rule 306, Uniforms and Equipment is hereby rescinded and reissued. Commanding Officer[s] shall ensure that this order and the attached Rule are posted on Department bulletin boards.” Revised Rule 306 is 23 pages and states, in pertinent part:

This rule is issued to establish regulations for the wearing and maintenance of the Boston Police Department uniform. It is effective immediately, replacing Rule 306, Uniforms and Equipment, Amended, dated October 28, 1985 [sic] and superseding all other written directives issued by the Department concerning uniform and equipment.

The following jackets and hats are no longer authorized:

- Special Order 80-94 (Superior Officer Nylon Jacket)
- Special Order 81-63 (Cloth Winter Reefer)
- Special Order 06-036 (Mesh Top, Eight Point, Dark Blue Police Cap)
- Other equipment not authorized:
 - 28” Leather Jacket
 - Orange Rain Coat

Sec. 6 Uniform Specifications⁶

- A) Cap accessories...
- B) Caps...
- C) Jackets...
- D) Optional Uniforms...Optional Storm Coat....
- E) Shirts...
- F) Trousers...
- G) Necktie...
- H) Socks...

⁶ The Department issues and replaces certain items listed in this section, including: caps, motorcycle boots and coats; bicycle jackets; safety goggles, batons, riot batons, handcuffs, etc. The Department also issues and replaces certain items that are not listed anywhere in Revised Rule 306, such as: tactical uniforms, jackets and boots.

- 1 I) Shoes...
- 2 J) Boots...
- 3 K) Buttons...
- 4 L) Gloves...
- 5 M) Whistle...
- 6 N) Traffic Vest:
 - 7 • Blauer Model Number 343
 - 8 ○ ANSI 207-2006 CERTIFIED (26" Long)
 - 9 ○ Hi-vis breathable mesh background fabric is fade resistant
 - 10 ○ Hi-contrast SCOTCHLIFE™ stripes for day/night visibility
 - 11 ○ Breakaway design with hook-and-loop fasteners comes
 - 12 apart a[t] shoulders and waist to prevent entanglement with
 - 13 car mirrors and attackers
 - 14 ○ Front and rear accommodate two rows of custom lettering
 - 15 ○ Double slotted pen pocket on delrin zipper front
 - 16 ○ Microphone tab on both shoulders
 - 17 ○ Fully adjustable at waist
- 18 O) Rain Gear...
- 19 P) Helmets...
- 20 Q) Trouser Belt...
- 21 R) Leather/Nylon Equipment...
- 22 S) Service Weapon...
- 23 T) Eyewear...
- 24 U) Baton...
- 25 V) Riot Baton...
- 26 W) Oleoresin Capsicum Spray...
- 27 X) Ear Piece...
- 28 Y) Handcuffs...
- 29 Z) Emblems, Patches, Tie Clips and Badges...

SPECIAL NOTE

Following is the list of all equipment/accessories issued by the department:

BATON
 RIOT BATON
 BADGE
 EQUIPMENT BAG
 GAS MASK
 GAS MASK CARRYING CASE
 ID CARD
 OC SPRAY
 OC HOLDER
 PERSONAL PROTECTIVE EQUIPMENT (WMD)
 BATON KEEPERS

1 BODY ARMOR
2 BOOTS (Motorcycle and mounted patrol officers only.)
3 CAP ACCESSORIES (Band and Cap Badge
4 Silver for Police Officers
5 Gold for Superior Officers
6 EMBLEMS, PATCHES, TIE CLIPS, CHEVRONS, BADGES
7 GLOVES
8 HANDCUFFS
9 HELMETS
10 LEATHER EQUIPMENT: Standard department-issued holster for service
11 pistol.
12 SAFETY GOGGLES (Motorcycle operators)
13 SERVICE WEAPON (As authorized by the Commissioner)
14 WALKIE-TALKIE RADIO AND HOLDERS, CHARGERS AND SPARE
15 BATTERY
16

17 Both Nee and Rose received Special Order 08-035 and Revised Rule 306 via the
18 Commissioner's October 22, 2008 e-mail and both acknowledged receipt pursuant to
19 Rule 102, Section 5.⁷

20 **Protocol for Department Rule Changes**

21 When the Department changes a rule, it first sends the proposed changes to the
22 Legal Advisors Office for review, which then sends it to the Department's Office of Labor
23 Relations (OLR) to create a draft proposal. OLR then sends the proposal to the
24 Association for review, input and further negotiations, if necessary. Once the parties
25 reach a final agreement, the Department promulgates the new Rule. When the
26 Association requests a status update for a new or revised rule, the Department will
27 highlight certain changes included in a special orders, especially if the rule is particularly
28 lengthy (e.g., 20, 30, 40 pages or longer).

⁷ On cross-examination, Rose admitted that while he is familiar with Rule 102, sometimes he reads new and/or revised rules thoroughly and other times he does not. On occasion Rose has contacted the Department's Office of Labor Relations (OLR) and requested updated rules; however, he did not contact OLR for an updated version of Revised Rule 306.

1 Customarily, whenever the Association requested a “track change” version of a
2 revised rule, the Department would respond to that request by providing the Association
3 with a revised rule that included highlights of any changes made by the Department that
4 differed from the previous rule. Although the Association never requested a “track
5 change” version of Revised Rule 306, the Department independently highlighted some
6 changes to that rule (e.g., its elimination of certain jackets and hats or the creation of
7 the optional storm coat); however, it did not highlight the rule change concerning the
8 Department’s issuance or replacement of traffic vests.

9 **The 2009 Complaints and Grievance**

10 Within the first six months after the Commissioner issued Revised Rule 306, the
11 Association complained about inadequate vest sizes for some of the officers, including
12 Association Treasurer Duke Fitzgerald (Fitzgerald). In response to those complaints,
13 the Department resized the affected unit members and reordered and reissued their
14 initial vests. By February of 2009, the Department had completed its issuance of all
15 initial traffic vests to the officers. At the Academy, the Department began requiring
16 Student Officers to purchase their own initial traffic vests in 2009. However, in 2013,
17 the Department agreed to pay the costs of the initial traffic vests for Student Officers
18 who were assigned to specific inclement weather events and the Boston Marathon.

19 In addition to complaining about vest sizes, the Association filed a grievance on
20 January 20, 2009, regarding Revised Rule 306’s new requirement to use the “Blauer”
21 Model Number 9915Z. Specifically, the Association contended that the Department
22 violated Article 17, Section 5 of the 2007-2010 Agreement by failing to pay for the initial
23 cost of the Blauer jacket for certain officers as of October 22, 2008.

The Employer's 2011 Denial of Replacement Traffic Vests

In or about October of 2011, Sergeant Mike O'Hara (O'Hara) instructed an officer from District 14 to request a replacement traffic vest from Central Supply. The officer requested the replacement vest because his had become worn from normal use. Central Supply denied his request pursuant to Revised Rule 306 because the Department only provided replacement traffic vests to officers who had damaged their vests in the line of duty.⁸ Immediately following that incident, Shaw informed Rose that Central Supply had refused to pay for the costs of replacing an officer's traffic vest. Rose contacted Central Supply⁹ and then Chief Linskey about the Department's refusal to provide officers with replacement traffic vests. Chief Linskey informed Rose that each officer was responsible for their own replacement vests per Special Order 08-035 and Revised Rule 306.

DECISION**Timeliness**

As a preliminary issue, I address the City's argument that any allegations of unlawful conduct occurring six months after the Commissioner issued Revised Rule 306 on October 22, 2008 are time-barred. DLR Rule 456 CMR 15.03 states, "Except for

⁸ For 25 years, the Department has employed William Goodwin (Goodwin) as Buyer for Central Supply. As Buyer, Goodwin purchases supplies and equipment but does not purchase uniforms. In or about early 2009, Central Supply received its first purchase order for traffic vests and, since that time, Goodwin has only issued replacement traffic vests to officers who had damaged their initial vests in the line of duty. Goodwin has never issued replacement vests to officers due to normal wear and tear. The record is not clear about whether Goodwin denied the officer's request for a replacement vest in October of 2011.

⁹ Rose testified that he made a couple of telephone calls to Central Supply and may have spoken with "Don" and/or "Jim" about the Department's 2011 denial of the replacement traffic vest. The parties did not confirm the identity of Don or Jim.

1 good cause shown, no charge shall be entertained by the [DLR] based upon any
2 prohibited practice occurring more than six (6) months prior to the filing of a charge with
3 the [DLR]." A charge of prohibited practice must be filed with the DLR within six months
4 of the alleged violation or within six months from the date the violation became known or
5 should have become known to the charging party, except for good cause shown. Felton
6 v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1992). The six-month period of
7 limitations for filing charges with the DLR begins to run when the party adversely
8 affected receives actual or constructive notice of the conduct alleged to be an unfair
9 labor practice. Boston School Committee, 35 MLC 277, 285-86 (2009); Town of Lenox,
10 29 MLC 51, 52 (2002) (citing Wakefield School Committee, 27 MLC 9, 10 (2000)); Town
11 of Middleborough, 18 MLC 1409 (1992). An allegation that a charge is untimely is
12 an affirmative defense, therefore, the Employer in this case has the burden of showing
13 that the Association knew of the changed traffic vest replacement costs prior to the
14 expiration of the statutory limitation period. Diane McCormick v. Labor Relations
15 Commission, 412 Mass. 164, 171, n.13 (1992); Commonwealth of Massachusetts, 35
16 MLC 268, 269 (2008); Town of Dennis, 28 MLC 297, 301 (2002); Town of Dennis, 26
17 MLC 203 (2000).

18 The City argues that the Association learned of the change on October 22, 2008
19 when the Commissioner issued Special Order 08-035 and Revised Rule 306. Pointing
20 to the special notes section of Revised Rule 306, the Employer contends that the
21 Department's exclusion of traffic vests from the list of issued items constitutes sufficient
22 notice of the change for purposes of 456 CMR 15.03. Relying on Felton, 33 Mass. App.
23 Ct. at 927-28, it argues that careful review of Revised Rule 306 would have caused a

1 reasonably prudent union to know that the employer may have caused harm by omitting
2 traffic vests from that section of the rule. The City asserts that the Association was
3 unreasonably imprudent by waiting until October of 2011 to complain about changes
4 made to the traffic vests in 2008.¹⁰

5 The Association argues that the Charge is timely because it first became aware
6 of the changes to traffic vests in October of 2011 when Central Supply denied an
7 officer's request for a replacement vest. It contends that the parties agreed at the
8 Commissioner's meeting that the City would issue all initial traffic vests, and while the
9 Department omitted the vests from the issued-items list in Revised Rule 306, the
10 Employer also omitted other items from that rule but continued to issue and replace
11 them after October 22, 2008. Also, the Association reasonably believed that the
12 Department would continue the parties' 19-year practice of issuing and replacing traffic
13 vests because the parties bargained to replace the traffic belts with traffic vests but
14 never bargained specifically over replacement costs for the traffic vests. Even if Nee
15 and Rose had reviewed Revised Rule 306 when it was issued in October of 2008, the
16 Association asserts, neither could have known about the change by merely reading the
17 rule because the rule was 23 pages long and the Department's failure to highlight the

¹⁰ In the alternative, the Employer argues that the Association through Shaw should have known that a change had occurred when the Department began requiring Student Officers to purchase their initial vests in 2009. Although the Employer concedes that Student Officers are not covered by the Agreement, except for matters involving compensation and wages, it contends that Shaw should have raised his concerns about the traffic vests in 2009 but failed to act. It is undisputed that G.L. c.41 §96B expressly prohibits Student Officers from being covered by the Agreement, except for matters involving compensation and wages which do not include the traffic vests. As such, I do not find that the Association had requisite notice of the Employer's October 22, 2008 change when the Department instructed Student Officers to pay for both their initial and replacement vests in 2009.

1 traffic vest changes contravened its prior practice of providing track-change versions of
2 newly-issued rules. Moreover, because three years is the average lifespan of a traffic
3 vest, the Association maintains that it could not have become aware of the changes in
4 replacement costs until October of 2011 when the first request for a replacement vest
5 was made.

6 The evidence shows that the City did not provide sufficiently clear information in
7 Revised Rule 306 to put the Association on notice that the Department had changed the
8 established practice of issuing and replacing traffic equipment when it removed traffic
9 vests from the list of issued items. See Town of Hudson, 25 MLC 143, 148 (1999) (the
10 information provided by the employer must be sufficiently clear and definite and must be
11 received far enough in advance to allow the union to determine an appropriate response
12 and permit effective bargaining to occur); see also Town of Watertown, 32 MLC 54, 56-
13 57 (2005) (citing Commonwealth of Massachusetts, 28 MLC at 242; Boston School
14 Committee, 4 MLC 1912, 1915 (1978)). First, it is undisputed that the parties agreed in
15 2008 that the City would issue the initial traffic vests to officers. It is also undisputed
16 that while Revised Rule 306 omits traffic vests from the issued-items list, the rule also
17 omits other items that the Employer continued to issue and replace after October 22,
18 2008 (e.g., bicycle gear, tactical gear and accessories). Based on this evidence I find
19 that the Association did not have actual or constructive notice of the change when the
20 Commissioner issued Revised Rule 306 on October 22, 2008, but became aware of the
21 change in October of 2011 and filed its Charge within six months of that event.
22 Accordingly, I find that the allegations in the Complaint are not time-barred.

23 **Unilateral Change**

1 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
2 when it unilaterally changes an existing condition of employment or implements a new
3 condition of employment involving a mandatory subject of bargaining without first giving
4 its employees' exclusive bargaining representative notice and an opportunity to bargain
5 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
6 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
7 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63
8 (2003), aff'd sub nom. Secretary of Administration and Finance v. Commonwealth
9 Employment Relations Board, 74 Mass. App. Ct. 91 (2009). The employer's obligation
10 to bargain before changing conditions of employment extends to working conditions
11 established through past practice, as well as those specified in a collective bargaining
12 agreement. Town of Wilmington, 9 MLC 1694, 1699 (1983).

13 **Past Practice**

14 To determine whether a binding past practice exists, the Commonwealth
15 Employment Relations Board (CERB) "analyzes the combination of facts upon which
16 the alleged practice is predicated, including whether the practice has occurred with
17 regularity over a sufficient period of time so that it is reasonable to expect that the
18 practice will continue." Commonwealth of Massachusetts 30 MLC at 64. While the
19 CERB "inquires whether employees in the unit have a reasonable expectation that the
20 practice in question will continue," City of Westfield, 22 MLC 1394, 1404 (H.O. 1996),
21 aff'd, 25 MLC 163 (1999), it also focuses on the fact that "[a] past practice is a practice
22 which is unequivocal, has existed substantially unvaried for a reasonable period of time

1 and is known and is accepted by both parties." Commonwealth of Massachusetts 30
2 MLC at 64.

3 Here, the parties do not dispute that prior to October of 2008, the City provided
4 officers with initial traffic belts and replacement traffic belts, at no cost to the officers.
5 This practice continued when the Department transitioned from requiring orange traffic
6 belts in 1989 to white reflective belts in the 1990s. The parties also agree that the
7 Department has always categorized both traffic belts and traffic vests as equipment that
8 officers use for special events and are not part of their daily uniform. However, the
9 parties dispute whether there was an agreement over who would pay for the costs of
10 replacement vests.

11 The record shows that the parties only bargained over replacing traffic belts with
12 traffic vests and over the costs of complying with the federally mandated color of Anci 3.
13 While the parties ultimately agreed that the City would pay for the costs of the initial
14 traffic vests, they never bargained over who would be responsible for replacement costs
15 of the vests, and did not agree that individual officers would pay for their own
16 replacement vests. When the Commissioner issued Revised Rule 306, he selectively
17 highlighted the change that the vests would replace belts but, failed to highlight the
18 change that the Employer would no longer issue replacement vests. The Association
19 did not know about the change until October of 2011, when a unit member
20 unsuccessfully requested a replacement vest from Central Supply.

21 Based on this evidence, I find that the City's decision to stop purchasing
22 replacement traffic vests unilaterally changed the established practice of issuing and
23 replacing traffic equipment because the practice occurred substantially unvaried and

1 with regularity for a period of over 19 years, causing unit members to reasonably expect
2 the practice would continue. Commonwealth of Massachusetts 30 MLC at 64; City of
3 Westfield, 22 MLC at 1404, aff'd, 25 MLC at 163.

4 **Waiver by Inaction**

5 As part of its affirmative defense, the City also argues that the Association
6 waived by inaction its right to bargain over the change to traffic vests.

7 Section 6 of the Law requires public employers to negotiate in good faith with
8 respect to wages, hours, standards or productivity and performance, and any other
9 terms and conditions of employment. Section 6 also precludes unilateral action without
10 first bargaining with the employee organization to resolution or impasse. The CERB
11 has long recognized affirmative defenses to the Section 6 obligation to bargain, which
12 includes waiver by inaction. Where a public employer raises the affirmative defense of
13 waiver by inaction, it bears the burden of proving by preponderance of the evidence that
14 the union had: (1) actual knowledge or notice of the proposed change; (2) a reasonable
15 opportunity to negotiate prior to the employer's implementation of the change; and (3)
16 unreasonably or inexplicably failed to bargain or to request bargaining. Town of
17 Watertown, 32 MLC at 56-57 (citing Town of Hudson, 25 MLC at 148; Town of Milford,
18 15 MLC 1247, 1252-54 (1988), Scituate School Committee, 9 MLC 1010, 1012-13
19 (1982)).

20 The CERB does not infer a union's waiver of its statutory right to bargain without
21 a "clear and unmistakable" showing that a waiver occurred. Commonwealth of
22 Massachusetts, 28 MLC at 40 (citing Holyoke School Committee, 12 MLC 1443, 1452
23 (1985); City of Everett, 2 MLC 1471, 1476 (1976), aff'd Labor Relations Commission v.

1 City of Everett, 7 Mass. App. Ct. 826 (1979)). Nor will it apply the doctrine of waiver by
2 inaction in cases where a union is presented with a fait accompli. Massachusetts Port
3 Authority, 36 MLC 5, 13 (2009) (citing Town of Hudson, 25 MLC at 148); Ashburnham-
4 Westminster Regional School District, 29 MLC 191, 194 (2003).

5 The Association argues that the City cannot meet its burden of establishing that
6 the Association had any knowledge or notice of the change to traffic vests because the
7 Department never gave the Association sufficient notice and a reasonable opportunity
8 to bargain over the change. Specifically, it points to Revised Rule 306, which is silent
9 about whether the Department or individual officers are required to pay the costs for
10 replacement traffic vests. It also points to additional equipment items that the City
11 omitted from Revised Rule 306, but continues to replace at no cost to the officers, such
12 as motorcycle gear, tactical gear, etc. Based on those omissions, and because the
13 parties never agreed to the “one-and-done” solution proposed by Chief Linskey, the
14 Association contends that it did not have a reasonable opportunity to bargain over the
15 change.

16 Relying on City of Boston, 32 MLC 173, 175 (2005), the City argues that the
17 Association had actual notice of the change to traffic vests on October 22, 2008 when it
18 received Revised Rule 306 and President Nee and Secretary Rose acknowledged their
19 receipt of that rule even though they had failed to read it. Also relying on Felton, 33
20 Mass. App. Ct. at 927-28, it argues alternatively that when the Commissioner issued
21 Revised Rule 306, Nee and Rose should have known that on October 22, 2008, the City
22 unilaterally changed the costs of employees’ replacement vests based on its exclusion
23 from the list of issued items in Revised Rule 306. Citing Town of Milford, 15 MLC at

1 1252 and Town of Dennis, 12 MLC 1027, 1032-33 (1985), the City concludes that the
2 Association waived its right to bargain because, instead of demanding to bargain, it
3 inexplicably waited three years to complain.

4 However, as discussed in the section on timeliness, above, I find that the
5 Association had neither actual notice nor constructive notice of the change. Although
6 President Nee and Secretary Rose failed to read Revised Rule 306, and even though
7 they signed an acknowledgement of having received the rule, the record shows that
8 even if they had read the rule, they would not have been able to determine that a
9 change had been made because the rule did not contain sufficient information to
10 establish a change or warrant an adequate response. Town of Watertown, 32 MLC at
11 56-57. Also, the record shows that: (1) parties did not bargain over the costs of
12 replacement vests in 2008; (2) the Association reasonably relied on the Employer's 19-
13 year prior practice of issuing and replacing traffic belts and other equipment items; (3)
14 both Rule 306 and Revised Rule 306 are silent about the specific issue of replacement
15 costs; (4) the Commissioner selectively highlighted some changes in Revised Rule 306
16 while failing to highlight the change to traffic vest replacement costs; and (5) after
17 October 22, 2008, the City continued to issue and replace other equipment items that
18 were also omitted from Revised Rule 306.

19 Based on this evidence, I do not find that the Association clearly and
20 unmistakably waived its right to bargain over changes to the traffic vests because it did
21 not have notice of the change until October of 2011. Commonwealth of Massachusetts,
22 28 MC at 40. Because the City cannot show that it gave the Association requisite
23 notice, its affirmative defense of waiver by inaction must fail. Town of Watertown, 32

1 MLC at 56-57; Town of Natick, 19 MLC at 1754. Consequently, I find that the City
2 changed an established practice of issuing and replacing traffic equipment, which
3 affected a mandatory subject of bargaining, and implemented that change without first
4 giving the Association prior notice and an opportunity to bargain in violation of Section
5 10(a)(5) of the Law.

6 CONCLUSION

7 For the reasons stated above, I conclude that the City violated Section 10(a)(5)
8 and, derivatively, Section 10(a)(1) the Law by failing to bargain in good faith when it
9 required unit members to purchase replacement vests without first giving the
10 Association prior notice and an opportunity to bargain to resolution or impasse over the
11 decision and the impact of that decision on employees' terms and conditions of
12 employment.

13 ORDER

14 WHEREFORE, based on the foregoing, it is hereby ordered that the City of
15 Boston shall:

16 1. Cease and desist from:

- 17
18 a. Unilaterally requiring unit members to purchase replacement traffic vests
19 without first giving the Association notice and an opportunity to bargain to
20 resolution or impasse.
21
22 b. Failing or refusing to bargain collectively and in good faith with the
23 Association regarding the provision of replacement traffic vests.
24
25 c. In any like manner, interfering with, restraining and coercing its employees in
26 any right guaranteed under the Law.
27

28 2. Take the following affirmative action that will effectuate the purpose of the Law:

- 29
30 a. Restore the practice of providing unit members with replacement traffic
31 equipment.

- 1
2 b. Upon request, bargain with the Association in good faith to resolution or
3 impasse before implementing any changes to the practice of providing unit
4 members with replacement traffic equipment.
5
6 c. Make whole the affected employees by reimbursing them for the costs of
7 purchasing replacement traffic vests, plus interest on any sums owing at the
8 rate specified in M.G.L. c. 321, sec. 6I compounded quarterly;
9
10 d. Sign and post immediately in conspicuous places where employees usually
11 congregate or where notices to employees are usually posted, including
12 electronically, if the City customarily communicates to its employees via
13 intranet or e-mail, and maintain for a period of thirty (30) consecutive days
14 thereafter signed copies of the attached Notice to Employees;
15
16 e. Notify the DLR in writing of the steps taken to comply with this decision within
17 thirty (30) of the steps taken by the City to comply with the Order.

18 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



**THE COMMONWEALTH OF MASSACHUSETTS
NOTICE TO EMPLOYEES
POSTED BY ORDER OF A HEARING OFFICER OF THE
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the City of Boston (City) violated Sections 10(a)(5) and, derivatively, 10(a)(1) of General Laws Chapter 150E (the Law) by failing to bargain in good faith with the Boston Police Patrolmen's Association (Association) when it required bargaining unit members to purchase replacement traffic vests without first giving the Association prior notice and an opportunity to bargain to resolution or impasse. The City posts this Notice to Employees in compliance with the Hearing Officer's order.

Section 2 of the Law gives all employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The City assures its employees that:

WE WILL NOT require bargaining unit members to purchase replacement traffic vests without first giving the Association notice and an opportunity to bargain to resolution or impasse.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Association regarding the provision of replacement traffic vests.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights protected under the Law.

WE WILL restore the practice of providing bargaining unit members with replacement traffic equipment.

WE WILL upon request, bargain with the Association in good faith to resolution or impasse before implementing any changes to the practice of providing bargaining unit members with replacement traffic equipment.

WE WILL make whole the affected employees by reimbursing them for the costs of purchasing replacement traffic vests, plus interest on any sums owing at the rate specified in M.G.L. c. 321, sec. 6I compounded quarterly.

City of Boston

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).